

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
FOURTH REGION**

MERCY FITZGERALD HOSPITAL¹

Employer

and

Case 4–RC–20137

DISTRICT 1199C, NATIONAL UNION OF
HOSPITAL AND HEALTH CARE EMPLOYEES,
AFSCME, AFL-CIO

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board; hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.
3. The labor organization involved claims to represent certain employees of the Employer.

¹ The Employer's name appears as amended at the hearing.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The Employer operates an acute care hospital (herein called the Hospital) in Darby, Pennsylvania. The Petitioner seeks to represent a unit of the Hospital's non-professional employees, excluding business office clericals, technical employees, and skilled maintenance employees.² The Employer agrees as to the appropriateness of this unit, but disputes the placement of five employee classifications. The Employer, contrary to the Petitioner, would exclude Nursing Secretaries III and Medical Records Clerks as business office clericals; Environmental Service Department crew leaders as supervisors; and Clinical Health Technicians (CHTs) and Mental Health Technicians (MHTs) as technical employees.³

Nursing Secretaries III. Approximately 90-100 employees in this classification work at desks located in patient care units throughout the Hospital. According to their Position Description, Nursing Secretaries III function as unit receptionists, greeting patients and visitors as they arrive. They also notify nurses when patients are summoned to other areas of the Hospital for tests, answer phones and page physicians and other personnel. Nursing Secretaries III are responsible for preparing patient charts and bracelets, transcribing physician orders, scheduling patient tests, filing test results and reports, and maintaining a daily log of admissions, transfers and discharges. They also deliver specimens, supplies and reports to other departments and process daily laboratory orders.

The Nursing Secretaries III report to the Patient Care Managers, who also supervise other employees in the units. They spend most of their time in their units, although they are occasionally obliged to visit other areas of the Hospital to use equipment or pick up documents. Nursing Secretaries III also ensure that the Admissions Department provides all necessary registration information to their units, and they occasionally have contact with patients as part of this process. The amount of such contact is limited, however, and the Nursing Secretaries III spend the bulk of their time performing clerical functions.

The Hospital maintains a Business Office which handles billing and other financial matters. The Business Office is located in a separate area on the first floor of the facility. There is no evidence that the Nursing Secretaries III have significant contact with Business Office employees.

The Board has consistently distinguished between business office and hospital clericals, including the latter group in units of service and maintenance (or "other non-professional") employees while excluding the former group. *Rhode Island Hospital*, 313 NLRB 343, 359

² The petitioned for unit is essentially the "other non-professionals" unit or service and maintenance unit, identified in the Board's Healthcare Rulemaking, 284 NLRB 1528, 1565.

³ Although the Petitioner initially contended at the hearing that pharmacy technicians should be included in the unit, the Petitioner later agreed with the Employer that these employees should be excluded.

(1993) and cases cited therein.⁴ Business office clericals typically work in departments separate and apart from service and maintenance employees, perform business office work which is only tangentially related to the work done by service and maintenance workers, have little contact with the service employees and are separately supervised. *William W. Backus Hospital*, 220 NLRB 414 (1975). Hospital clericals are usually located in departments throughout a hospital where they perform work related to the functions of service and maintenance employees and are subject to the same supervision. *Rhode Island Hospital*, supra. The Nursing Secretaries III work in patient care units under Patient Care Managers and perform work related to the functions of other patient care unit employees. Accordingly, I find they are not business office clericals, and I shall include them in the unit sought by the Petitioner.

Medical Records Clerks. The 15 Medical Records Clerks report to the Medical Records Department Manager and work in a separate office on the first floor of the Hospital. The Medical Records Office is adjacent to administrative offices and about 100 feet from the Business Office. According to their Position Description, the Medical Records Clerks maintain records following patient discharge, request physicians to complete various records and charts, and file and distribute reports or other documents as necessary.

Medical Records Clerks visit patient care units on a daily basis to retrieve records of patients who are being discharged or transferred. Physicians and other patient care personnel sometimes request records of patients being readmitted to the Hospital, and the Medical Records Clerks deliver those records to the Emergency Room and Intensive Care Unit. In all other cases, unit personnel visit the Medical Records Department to pick up the requested material. Business Office employees sometimes contact Medical Records Clerks to request records for purposes of billing or insurance claims.

Even when located in a department isolated from patient care areas, medical records clerks have generally been deemed hospital clericals rather than business office clericals, especially when they have contact with employees who deal directly with patients. *Rhode Island Hospital*, supra at 362-363; *William W. Backus Hospital*, supra at 415; *Baptist Memorial Hospital*, 225 NLRB 1165, 1168 (1976); *Sisters of St. Joseph of Peace*, 217 NLRB 797, 798 (1975). Cf. *St. Luke's Episcopal Hospital*, 222 NLRB 674, 677 (1976). The Medical Records Clerks in this case visit patient care areas on a regular basis to pick up and deliver records and have regular contact with patient care employees in the course of performing these functions. As I find that the Medical Record Clerks are not business office clericals, I shall include them in the unit sought by the Petitioner.

Environmental Services Crew Leaders. Employees in the Employer's Environmental Services Department clean rooms and floors, remove trash and perform other unskilled maintenance work. There are about 71 employees in this department. The Employer has contracted with a private company, Professional Services, to manage the Department, and Professional Services employs Environmental Services Director Curtis Wright and three shift

⁴ In that case, the Board further noted that it recognized the distinction between business office and hospital clericals in its Healthcare Rulemaking. 284 NLRB 1528 at 1565.

supervisors.⁵ The Department is a three shift operation, and a shift supervisor is assigned to each shift. The shift supervisors are present on weekdays and are on-call during weekends. The other Environmental Services Department employees, including the five crew leaders, are employed directly by the Employer. Two crew leaders are assigned to the day and evening shifts, and one crew leader works at night. The day and evening shift crew leaders alternate working weekends and are in charge of the Environmental Services employees working their shifts on Saturdays and Sundays. Only one Environmental Services employee is present in the facility on weekend night shifts, and the night shift crew leader does not work on weekends. The crew leaders are also in charge whenever a shift supervisor is absent due to vacation, illness or to attend meetings or other functions outside the Department. The crew leader Position Description indicates that incumbents relieve, “for a supervisor for days off or vacation and short periods of time, responding to pages and handling problems” and prepare “daily reports when relieving for supervisor.” The Position Description also lists a multitude of tasks to be performed directly by the crew leaders, including floor care, furniture moving, trash collection, and cleaning patient rooms and common areas. They often work with crews of two to three employees in performing these tasks.

The shift supervisors determine the level of staffing needed to handle operations and the areas to which employees are assigned. In the absence of staffing shortages or special projects, employees work in the same area every day performing the same tasks. When shift supervisors are present, the crew leaders’ authority over other employees is limited to answering their questions and instructing them when they perform a function incorrectly. Crew leaders can also alter regularly scheduled breaks if a break would cause a safety hazard.

When substituting for shift supervisors, crew leaders can reassign employees to different work areas to cover for staffing shortages or special projects. They can also contact employees not scheduled to work and ask them to report. In this regard, the crew leaders are given lists of available employees and contact the employees in the order they appear on the lists until they are able to secure the number of workers needed. Employees are not required to honor crew leader requests that they report when not scheduled. Shift supervisors wear beepers so that crew leaders can contact them.

Crew leaders filling in for supervisors can speak to employees who are performing work incorrectly or committing rules infractions. They can also report their observations to shift supervisors who may investigate and take formal disciplinary action. If an employee is insubordinate the crew leader can not suspend him or her without telephoning a shift supervisor. Occasionally, crew leaders may provide an employee with “awareness counseling,” i.e. a verbal warning, but there is no evidence that awareness counseling has led to higher level discipline. Wright testified that shift supervisors consider disciplinary recommendations from crew leaders, but he did not provide any examples in support of this testimony. When substituting for supervisors, crew leaders complete management and communications logs. They also respond to and attempt to resolve employee complaints. For example, if one employee taunts another, the

⁵ The parties stipulated that the shift supervisors are supervisors within the meaning of Section 2(11) of the Act.

crew leader may speak to both employees and report the incident to a shift supervisor. The crew leaders have no direct input into written employee evaluations, which are prepared by shift supervisors, but they may discuss employee performance with the shift supervisors throughout the year. Crew leaders are paid about \$1 per hour more than other Environmental Services employees and wear the same uniform. The shift supervisors do not wear uniforms.

A finding of supervisory status is warranted only where the individuals in question possess one or more of the indicia set forth in Section 2(11) of the Act. *Providence Hospital*, 320 NLRB 717, 725 (1996); *The Door*, 297 NLRB 601 (1990); *Phelps Community Medical Center*, 295 NLRB 486, 489 (1989). The statutory criteria are read in the disjunctive, and possession of any one of the indicia listed is sufficient to make an individual a supervisor. *Providence Hospital*, supra, 320 NLRB at 725; *Juniper Industries*, 311 NLRB 109, 110 (1993). The statutory definition specifically indicates that it applies only to individuals who exercise independent judgment in the performance of supervisory functions and who act in the interest of the employer. *NLRB v. Health Care & Retirement Corp.*, 511 U.S. 571, 574, 146 LRRM 2321, 2322 (1994); *Clark Machine Corp.*, 308 NLRB 555 (1992). The Board analyzes each case in order to differentiate between the exercise of independent judgment and the giving of routine instructions, between effective recommendation and forceful suggestions and between the appearance of supervision and supervision in fact. *Providence Hospital*, supra, 320 NLRB at 725. The exercise of some supervisory authority in a merely routine, clerical or perfunctory manner does not confer supervisory status on an employee. *Id.*; *Juniper Industries*, supra, 311 NLRB at 110. The authority to effectively recommend “generally means that the recommended action is taken with *no* independent investigation by superiors, not simply that the recommendation is ultimately followed.” *ITT Lighting Fixtures*, 265 NLRB 1480, 1481 (1982) enf. denied on other grounds 712 F.2d 40, 114 LRRM 2067 (2nd Cir. 1983) (emphasis in original). The sporadic exercise of supervisory authority is not sufficient to transform an employee into a supervisor. *Robert Greenspan, DDS*, 318 NLRB 70 (1995), enf. 101 F.3d 107, 153 LRRM 2704 (2nd Cir. 1996), cert. denied, 117 S. Ct. 68, 153 LRRM 2736 (1996), citing *NLRB v. Lindsay Newspapers*, 315 F.2d 709, 712 (5th Cir. 1963); *Gaines Electric*, 309 NLRB 1077, 1078 (1992); *Ohio River Co.*, 303 NLRB 696, 714 (1991), enf. 961 F.2d 1578, 140 LRRM 2120 (6th Cir. 1992).

The burden of establishing supervisory status is on the party asserting that such status exists. *Fleming Companies, Inc.*, 330 NLRB No. 32, fn. 1 (1999); *Northcrest Nursing Home*, 313 NLRB 491, 496 fn. 26 (1993); see *Bennett Industries*, 313 NLRB 1363 (1994). The Board has cautioned that the supervisory exemption should not be construed too broadly because the inevitable consequence of such a construction would be to remove individuals from the protections of the Act. *Providence Hospital*, supra, 320 NLRB at 725; *Northcrest Nursing Home*, supra, 313 NLRB at 1491. Where the evidence is in conflict or otherwise inconclusive on particular indicia of supervisory authority, the Board will find that supervisory status has not been established, at least on the basis of those indicia. *Phelps Community Medical Center*, supra, 295 NLRB at 490. The legislative history of Section 2(11) makes it clear that Congress intended to distinguish between employees performing minor supervisory duties and supervisors vested with genuine management prerogatives, and did not intend to remove individuals in the former category from the protections of the Act. S. Rep. No. 105, 80th Cong., 1st Sess., 4 (1947), reprinted in 1 Legis. Hist. 407, 410 (LMRA 1947). The legislative history also shows that

Congress considered true supervisors to be different from lead employees or straw bosses that merely provide routine direction to other employees as a result of superior training or experience. *Id.*, reprinted at 1 Legis. Hist. At 410 (LMRA 1947). *Providence Hospital*, supra, 320 NLRB at 725; *Ten Broeck Commons*, 320 NLRB 806, 809 (1996). An individual will not be found to be a supervisor unless he or she has a “kinship to management.” *Adco Electric*, 307 NLRB 1113 fn. 3 (1992), *enfd.* 6 F.3d 1110, 144 LRRM 2763 (5th Cir. 1993); *NLRB v. Security Guard Service*, supra, 66 LRRM at 2250. Further, “supervisory direction” of other employees must be distinguished from direction incidental to an individual’s technical training and expertise, and technical employees will not be found to be supervisors merely because they direct and monitor support personnel in the performance of specific job functions related to the discharge of their duties. *Robert Greenspan, DDS*, supra, 318 NLRB at 76; *New York University*, 221 NLRB 1148, 1156 (1975).

I find that the Employer has failed to carry its burden to establish that the Environmental Services Department crew leaders are supervisors within the meaning of Section 2(11) of the Act. Thus, when shift supervisors are present, the crew leaders’ authority over other employees is limited to pointing out deficiencies in performance and altering break schedules to accommodate safety concerns. The Board has recognized that an employee does not become a supervisor merely because he gives some instructions or minor orders to other employees. *Byers Engineering Corp.*, 324 NLRB 740, 741 (1997). Inspection of work is a quality control function and does not rise to the level of supervisory authority. *Somerset Welding and Steel, Inc.*, 291 NLRB 913, 914 (1988). The ability to approve or alter breaktimes has been found to be a routine clerical matter which does not involve exercise of independent judgment. *Youville Health Care Center, Inc.* 326 NLRB 495, 496 (1998); *Providence Hospital*, 320 NLRB 717, 732 (1996). In the shift supervisors’ absence, the crew leaders are the highest ranking Environmental Services Department employees present in the Hospital, but this does not necessarily make them statutory supervisors, particularly where, as here, admitted supervisors are on-call. *Loyalhanna Care Center*, 332 NLRB No. 86 at slip. op. p. 2-4 (2000). Crew leaders are sometimes obliged to alter work assignments to accommodate staffing shortages or special projects, but any alterations are merely designed to equalize employee workloads and do not involve sufficient exercise of independent judgment to confer supervisory status. *Loyalhanna Care Center*, supra; p. 3; *Youville Health Care Center*, supra; *Quality Chemical, Inc.*, 324 NLRB 328, 330 (1997). Similarly, the crew leaders’ ability to seek off-duty volunteers to report to work when the Hospital is short-handed falls short of the supervisory authority to assign work contemplated by Section 2(11) since the crew leaders make calls in order of a list and they lack the power to compel employees to report for work. *Loyalhanna Care Center*, supra; *Green Acres Country Care Center*, 327 NLRB 257, 258 (1998). The role played by the crew leaders in employee discipline is also insufficient to make them statutory supervisors. The crew leaders can report rules infractions or instances of poor performance, but it is settled that the ability to report employee infractions is not an indication of supervisory status absent evidence that the reports are accompanied by recommendations regarding discipline which are routinely followed. *Loyalhanna Care Center*, supra, slip op. at 2; *Ten Broeck Commons*, 320 NLRB 806, 812 (1996). The record in this case does not clearly establish that the crew leaders make recommendations regarding discipline. Further, the Board has refused to find supervisory status based on counselings or verbal warnings absent evidence, missing here, of a regularly followed system of progressive discipline which would cause the counseling to have at least a potential

impact on employment status. *Green Acres Country Care Center*, supra. In short, I find the Employer has not demonstrated that the crew leaders possess any of the indicia of supervisory status set forth in the Act. Accordingly, I shall include them in the unit sought by the Petitioner.

Clinical Service Technicians and Mental Health Technicians. The Hospital employs about 150 Clinical Service Technicians (CSTs) who perform functions traditionally associated with hospital nursing aides. They assist patients with personal hygiene, feed and toilet patients, provide ambulation, make beds and take and read vital signs. In addition, CSTs draw blood, initiate and assist with CPR, collect non-invasive urine, stool and sputum specimens, apply bandages and anti-embolic stockings, assist with respiratory activities such as turning, coughing and deep breathing, and perform several relatively simple diagnostic tests, including pulse oximetry, venipuncture, Glucose Monitoring and EKG. CSTs are not authorized to administer medication.

Pulse oximetry measures the level of oxygen in a patient's blood. To perform the test, a CST places a sensor probe on a patient's finger, observes a screen for a numerical reading and reports the reading to a nurse. Glucose Monitoring indicates a patient's blood sugar and requires the CST to obtain a small blood sample which is placed on a test strip. The CST reads the result from the strip and reports it to a nurse. As for the EKG which measures a patient's heart function, the CST places electrodes on a patient's chest, prints a graph of heart waves on a machine and transmits the result to the Hospital's Cardiology Department for evaluation. The record does not indicate that CSTs are responsible for evaluating the results of any of the tests they administer.

Mental Health Technicians (MHTs) are CSTs who work in the Hospital's Psychiatric Unit. In addition to the functions performed by other CSTs, the MHTs conduct unit and body searches for potentially dangerous objects, report on patient behavior and participate in secluding and restraining patients. MHTs may apply wrist restraints without prior approval if they observe an agitated patient about to remove an intravenous or gastric tube. If wrist restraints are applied, medical personnel must be notified so that the decision to restrain the patient can be evaluated. Other forms of restraint may only be applied with prior approval from a nurse.

CSTs and MHTs must have nursing aide or nursing assistant certification. The course needed to obtain certification may take as little as two weeks or as long as three months. The Hospital conducts a two-week course to train CSTs to draw blood and perform the other diagnostic tests which are within the scope of their Position Description. A CST testified that when the Hospital changed her from a nursing assistant to a CST she received a 50 cent per hour wage increase.

Technical employees perform work of a technical nature involving the use of independent judgment and requiring the exercise of specialized training usually acquired in colleges or technical schools or through special courses. Technical status is frequently evidenced by the fact that the employee is certified, licensed or registered although employees may meet the standards of a technical employee without such certification. *Rhode Island Hospital*, 313 NLRB 343, 353 (1993); *Barnert Memorial Hospital*, 217 NLRB 775, 776-777 (1975). The CSTs and MHTs at the Hospital are obliged to secure a certification to perform the

portion of their jobs which involves routine patient care such as feeding and toileting. However, this aspect of the job does not involve work of a technical nature or the exercise of independent judgment. The CSTs can perform diagnostic tests after limited periods of on-the job training, and they do not analyze the test results. Similarly, little formal training is required before CSTs or MHTs are deemed competent to apply bandages, assist with routine respiratory treatments, make observations of psychiatric patients or apply restraints. The record does not establish that any of the duties performed by the CSTs require independent judgment. In sum, I find the Clinical Service Technicians and Mental Health Technicians are not technical employees as they do not perform jobs requiring either the use of significant independent judgment or the exercise of specialized training acquired through a substantial course of study. Accordingly, I shall include them in the unit. See *Southern Maryland Hospital Center, Inc.*, 274 NLRB 1470, 1473 (1985); *Pontiac Osteopathic Hospital*, 227 NLRB 1706, 1707 (1977); *Kanawha Valley Memorial Hospital, Inc.*, 218 NLRB 846, fn. 5 (1975); *Trumbull Memorial Hospital*, 218 NLRB 796, 797 (1975) (EEG and ECG Technicians).

6. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:⁶

All full-time and regular part-time transport aides, cafeteria workers, first cook, second cook, cook helper, kitchen workers, tray passers, host, hostesses, nutrition aides, environmental workers, store keepers, service worker laundry, linen workers, central processing assistant, rehabilitation aides, Clinical Service Technicians, Mental Health Technicians, Medical Record Clerks, Nursing Secretaries III and Environmental Service Department crew leaders employed by the Employer; excluding all other employees including pharmacy technicians, physicians, registered nurses, licensed practical nurses, other professional employees, technical employees, skilled maintenance employees, business office clericals, pool (per diem) employees, temporary employees, confidential employees, religious (sisters, clergy and brothers), patient registration representatives, patient registration technicians, senior central processing assistant, medical technicians, information liaisons, transcriptionists, physical therapy assistants, respiratory therapists, respiratory technicians, dietetic assistants, lead cafeteria, laboratory employees, secretary I, secretary II, all other secretaries except Secretary III in the Nursing Department, guards and supervisors as defined in the Act.

DIRECTION OF ELECTION

⁶ With the exception of the disputed classifications reviewed above, the parties stipulated that the unit which follows is appropriate.

Subsequent to the hearing, the parties stipulated to change the position title of “central processing department workers” to “central processing assistant.”

An election by secret ballot shall be conducted by the undersigned among the employees in the unit(s) found appropriate at the time and place set forth in the notice of election to be issued subsequently,⁷ subject to the Board's Rules and Regulations. Eligible to vote are those in the unit(s) who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by **District 1199C, National Union of Hospital and Health Care Employees, AFSCME, AFL-CIO.**

LIST OF VOTERS

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that an election eligibility list, containing the **full** names and addresses of all the eligible voters, must be filed by the Employer with the Regional Director for Region Four within 7 days of the date of this Decision and Direction of Election. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. I shall, in turn, make the list available to all parties to the election. In order to be timely filed, such list must be received in the Regional Office, 615 Chestnut Street, Seventh Floor, Philadelphia, Pennsylvania 19106, on or before **March 5, 2001**. No extension of time to file this list may be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement of such list. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission. Since the list is to be made available to all parties to the election, please furnish a total of **3 copies**, unless the list is submitted by facsimile, in which case no copies need be submitted. To speed preliminary checking and the voting process itself, the names should be alphabetized (overall, or by department, etc.). If you have any questions, please contact the Regional Office.

⁷ Your attention is directed of Section 103.20 of the Board's Rules and Regulations, a copy of which is enclosed. Section 103.20 provides that the Employer must post the Board's official Notice of Election at least three full working days before the election, excluding Saturdays and Sundays and that its failure to do so shall be grounds for setting aside the election whenever proper and timely objections are filed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, Franklin Court, 1099 14th Street, N.W., Room 11613, Washington, D.C. 20570. This request must be received by the Board in Washington by **March 12, 2001**.



Dated February 26, 2001

at Philadelphia, PA

/s/ Dorothy L. Moore-Duncan

DOROTHY L. MOORE-DUNCAN
Regional Director, Region Four

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